

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

AGENDA

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

Supreme Court's Advisory Committee on the Rules of Appellate Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

March 19, 2003 - 12:00 p.m.

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| 1. | WELCOME AND APPROVAL OF MINUTES | Todd Utzinger |
| 2. | APPELLATE QUALIFICATIONS RULE | Todd Utzinger |
| 3. | RULE 8 AMENDMENTS | Fred Voros |
| 4. | RULE 10 AMENDMENTS | Clark Sabey |
| 5. | MISCELLANEOUS RULE AMENDMENTS | Matty Branch |
| 6. | OTHER BUSINESS | |
| 7. | ADJOURN | |

The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.

MINUTES

APPROVED MINUTES

Supreme Court's Advisory Committee on the Rules of Appellate Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

March 19, 2003

ATTENDEES

Todd Utzinger
Julianne Blanch
Clark Sabey
Marian Decker
Karra Porter
Fred Voros
Judge Gregory Orme
Fred Metos
George Haley
Matty Branch
Clark Nielsen

EXCUSED

David Arrington
Larry Jenkins
Joan Watt

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Todd Utzinger welcomed the Committee members to the meeting. Clark Sabey noted a clerical change to the February minutes. With the change, Matty Branch moved to approve the minutes. Marian Decker seconded the motion. The motion carried unanimously.

II. APPELLATE QUALIFICATIONS RULE

Todd Utzinger distributed the latest version of the appellate qualifications rule. Mr. Utzinger explained the history of the proposal for the benefit of those members who had not previously participated in Committee discussions. Mr. Utzinger asked the Committee members whether they had any comments or concerns.

Judge Orme suggested language addressing attorneys who falsely certify their qualifications. Judge Orme suggested that, if an attorney falsely certifies, the appellate court could consider that as an aggravating factor in the event of a sanction. Todd Utzinger suggested that the appellate courts would simply deal with those situations as they see fit without the need to be specific in the rule. Julie Blanch stated that, in all other areas of the law, attorneys know that if they misrepresent facts or

qualifications, the attorney will be sanctioned. Clark Nielsen suggested that the rule should specifically state the consequences. Clark Sabey noted that Rule 44 allows the appellate court to sanction attorneys based on a failure to comply with the rules. The Committee members agreed that the language was broad enough to include this situation. Judge Orme stated that the rule clearly does not need to include language addressing consequences, but suggested that it might be helpful to provide notice to attorneys. Fred Voros suggested adding language at a later date if it becomes a problem. The Committee members agreed with this suggestion.

Judge Orme questioned whether language addressing employment by a legal services agency was necessary in light of other language which allowed qualification if counsel is supervised by another attorney. Judge Orme suggested that it should be sufficient if counsel is directly supervised. Fred Voros expressed a concern that supervision could be too broad, with the supervisor having little direction over the final product. Judge Orme suggested also having the supervisor sign the brief. Mr. Voros stated that such a requirement may be impractical, because most attorneys will not put their name on a work that they have not prepared.

Clark Nielsen stated that he was unclear about the language which stated that an agency must be "structured to ensure that counsel is supervised by an attorney proficient in appellate practice." Mr. Nielsen questioned whether this was a different level of proficiency. Judge Orme stated his belief that the supervisor in this situation should not be allowed to qualify under any provision other than paragraph (1).

After brief discussion, George Haley moved to amend paragraph (2) to state that "counsel is directly supervised by an attorney qualified under subsection (1)," and that the rest of the language be deleted. Fred Metos seconded the motion. The motion carried unanimously.

Clark Nielsen questioned whether it was appropriate to qualify an attorney who had done a large number of appeals, but not in recent years. Julianne Blanch also questioned whether it would be appropriate to qualify attorneys who had done appeals in other states, or in the federal system, when those attorneys were not familiar with the Utah rules. The Committee discussed the issue and agreed that the provision should remain as proposed, because those attorneys would presumably be conscientious and would research the current rules.

Mr. Nielsen also questioned whether it was appropriate to state that counsel has "litigated" at least three appeals. Fred Voros proposed stating "briefed and argued" instead of litigated. Karra Porter stated that argument should not be necessary to show proficiency. Judge Orme agreed, stating that briefing is the essence of the case. Fred Metos suggested "briefed on the merits." After brief discussion, Judge Orme made a motion to amend the rule to state that "counsel has personally briefed the merits in at least three appeals" George Haley seconded the motion. The motion carried unanimously.

After brief discussion, Clark Nielsen moved to approve the appellate qualifications rule as amended. Fred Voros seconded the motion. The motion carried unanimously.

Todd Utzinger then questioned the Committee members about the placement of the rule in the Rules of Appellate Procedure. Mr. Utzinger stated that there were two viable alternatives: placing the rule toward the beginning of the rules, because the rule would be relevant at the beginning of appellate proceedings, or to place the rule near other provisions that discuss attorneys in appellate practice. Fred Voros noted that the rules were grouped according to subject and that the “general provisions” may be the place for the rule. After brief discussion, Fred Voros moved to designate the rule as 38B and that its title would be “qualifications for appointed appellate counsel.” Clark Sabey seconded the motion. The motion carried unanimously.

Todd Utzinger stated that he will send the rule to the Chief Justice with a cover letter explaining that Judge Orme and Matty Branch will discuss the rule at the May conference of the appellate judges.

III. ADJOURN

The Committee agreed to discuss other pending business at the next meeting. The next meeting was scheduled for April 16, 2003. The meeting adjourned at 1:20 p.m.